APPEAL NO. 032612
FILED NOVEMBER 26, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on September 11, 2003. The hearing officer resolved the disputed issues of maximum medical improvement (MMI) and impairment rating (IR) by deciding that the appellant/cross-respondent (claimant) reached MMI on March 20, 2003, and that he has a 12% IR. The claimant appeals the hearing officer's IR determination, asserting that his IR is 24%. The respondent/cross-appellant (carrier) appeals the hearing officer's MMI and IR determinations, asserting that the claimant reached MMI on March 8, 2002, with a 10% IR.

DECISION

We affirm the hearing officer's determination on the MMI issue. We reverse and remand the hearing officer's determination on the IR issue.

It is undisputed that the claimant sustained a compensable injury on _____, when he was involved in a motor vehicle accident (MVA). The claimant testified that he injured his neck and left shoulder in the MVA, and in answers to interrogatories, stated that he injured his neck, and his left shoulder, arm, and hand.

The claimant has treated with Dr. D, who referred him to several doctors, including Dr. M, and Dr. R.

Dr. C, a carrier-selected required medical examination doctor, examined the claimant on July 16, 2001, and reported in a Report of Medical Evaluation (TWCC-69) that the claimant reached MMI on July 16, 2001, with a 12% IR. Dr. C assigned the IR using the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides 3rd ed.). The parties stipulated that the first IR was assigned by Dr. C. The parties appeared to agree at the CCH that since Dr. C's certification of MMI was made prior to October 15, 2001, the AMA Guides 3rd ed. is the appropriate edition of the AMA Guides to be used to assess the claimant's IR in this case. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.1(c)(2)(B)(ii) (Rule 130.1(c)(2)(B)(ii)).

Dr. K, examined the claimant on October 6, 2001, apparently at the request of the Texas Workers' Compensation Commission (Commission), and he reported that the claimant was not at MMI.

In a TWCC-69 dated March 8, 2002, Dr. D, the treating doctor, reported that the claimant reached MMI on March 8, 2002, with a 21% IR. Dr. D, used the Guides to the Evaluation of Permanent Impairment, fourth edition, (1st, 2nd, 3rd, or 4th printing,

including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides 4th ed.) to assess the IR.

In a TWCC-69 dated April 8, 2002, Dr. R, a referral doctor, reported that the claimant reached MMI on March 8, 2002, with a 20% IR.

The parties stipulated that as a result of an MMI and IR dispute, the Commission selected Dr. B, as the designated doctor. Dr. B, examined the claimant on March 14, 2002, and reported in a TWCC-69 that the claimant reached MMI on March 8, 2002, with a 10% IR. Dr. B, used the AMA Guides 4th ed. to assess the IR for the neck and left shoulder.

On October 8, 2001, Dr. D, the treating doctor, reported that using the AMA Guides 3rd ed., the claimant has a 20% IR.

In response to a Commission letter informing Dr. B, the designated doctor, that he would need to use the AMA Guides 3rd ed. to assess the IR, because the first IR was assigned in July 2001, Dr. B wrote that he would need to reexamine the claimant.

Dr. B, the designated doctor, reexamined the claimant on October 11, 2002, and reported in a TWCC-69 that the claimant reached MMI on March 14, 2002 (the date he first examined the claimant), and that the claimant has a 10% IR. Dr. B assessed the IR using the AMA Guides 3rd ed.

Dr. M, a referral doctor, reported in a TWCC-69 that the claimant reached MMI on December 9, 2002, with a 31% IR. Dr. M noted that he used the AMA Guides 4th ed. in the TWCC-69, but referenced the AMA Guides 3rd ed. in his narrative report dated December 9, 2002. Dr. M indicates that he used Dr. B's range of motion (ROM) measurements.

Dr. R, a referral doctor, reported in a TWCC-69 dated December 16, 2002, that the claimant reached MMI on March 8, 2002, and assigned the claimant a 22% IR. Dr. R used the AMA Guides 3rd ed, but indicates that he used Dr. D's, the treating doctor's, ROM measurements.

On January 17, 2003, the claimant's cervical surgery was preauthorized. And on January 28, 2003, the claimant underwent a cervical discectomy and fusion at C6-7, with a preoperative and postoperative diagnosis of cervical radiculopathy and C6-7 disc herniation with spondylosis. Dr. R was the surgeon. Dr. R wrote in February 2003 that the claimant's injury is related to his MVA of _____, and that the claimant sustained disc damage at C6-7, which necessitated surgery. The claimant testified that the surgery helped his neck condition. In a May 16, 2003, report, Dr. R stated that, while the claimant has some residual symptoms from the surgery, the claimant was greatly improved following the surgery.

On March 7, 2003, Dr. D, the treating doctor, wrote that since the claimant underwent surgery, his MMI should be rescinded and he would require a new IR.

The parties stipulated that, if applicable, the statutory date of MMI is March 20, 2003 (the expiration of 104 weeks after income benefits began to accrue, Section 401.011(30)(B)).

On March 12, 2003, a benefit review officer (BRO) wrote to Dr. B, the designated doctor, asking him whether the myelogram and cervical surgery would change his opinion on MMI and IR, and whether a reexamination would be necessary to establish a more accurate IR. The BRO sent Dr. B additional medical reports and noted that the claimant would reach statutory MMI on March 20, 2003.

In response to the BRO's inquiry, Dr. B, the designated doctor, wrote on March 27, 2003, that he considered the cervical surgical procedure to be medically unnecessary; that when he previously examined the claimant, there was no evidence of radiculopathy; and that the additional information did not change his previous opinions. Dr. B noted that he did not again examine the claimant.

In response to another request for clarification from the BRO, Dr. B, the designated doctor, wrote on May 8, 2003, that it appeared that the BRO was pushing him to assign an additional impairment based on the unnecessary operation, and that he would change the IR by assigning the claimant 7% IR based on Table 49, II(D) of the AMA Guides 3rd ed. for specific disorders of the cervical spine and combined that with the 5% impairment he had previously assigned for loss of ROM of the left shoulder to arrive at a 12% IR. Dr. B noted that the claimant would not be assigned any impairment for loss of cervical ROM because of inconsistencies in measurements on the previous examinations. Dr. B noted that there was no change in the MMI date. In a TWCC-69, Dr. B reported that the claimant reached MMI on March 14, 2002, with a 12% IR, and noted that he used the AMA Guides 3rd ed. There is no indication in Dr. B's report that he reexamined the claimant in responding to the BRO's inquiry. The claimant testified that Dr. B examined him twice, both times before his surgery, with no examination by Dr. B after his surgery.

Dr. R, the referral doctor and surgeon, reported in a TWCC-69 dated May 16, 2003, that the claimant had reached MMI on March 15, 2003, with a 24% IR. Dr. R indicated on the TWCC-69 that he used the AMA Guides 4th ed. to assess the IR, but his narrative report reflects that he actually used the AMA Guides 3rd ed. to assess the IR. Dr. R's narrative report reflects that he actually examined the claimant on May 16, 2003, which was after the claimant's surgery and after the date of statutory MMI, and that he performed ROM testing. Dr. R incorrectly noted that the date of statutory MMI was March 15, 2003, instead of March 20, 2003, as stipulated to by the parties, but that is not significant given the fact that Dr. R examined the claimant after the claimant had surgery in January 2003 and after the claimant reached statutory MMI. Dr. R assessed 9% impairment under Table 49, II(E) for specific disorders of the cervical spine (a surgically treated disc lesion with residual symptoms), and 16% impairment for loss of

cervical ROM. He combined those values under the combined values chart to arrive at the 24% IR.

The carrier appeals the hearing officer's determination that the claimant reached MMI on March 20, 2003, contending that the claimant reached MMI on March 8, 2002, based on the designated doctor's first report. Effective for a claim for workers' compensation benefits based on a compensable injury that occurs before June 17, 2001, Section 408.122(c) provides that the designated doctor's report has presumptive weight, and the Commission shall base its determination of whether the employee has reached MMI on the designated doctor's report unless the great weight of the other medical evidence is to the contrary. The hearing officer found that the great weight of the other medical evidence is contrary to Dr. B's, the designated doctor's, report that the claimant reached MMI on March 14, 2002, which predated the claimant's January 28, 2003, surgery, and that the great weight of the other medical evidence is that the claimant reached MMI on March 20, 2003, which is the statutory date of MMI. The hearing officer concluded that the claimant reached MMI On March 20, 2003. In reaching her decision, the hearing officer noted that there was evidence that the claimant improved after his surgery. The Appeals Panel has observed that surgery subsequent to a finding of MMI by a designated doctor may show the finding of MMI to be against the great weight of the other medical evidence. Texas Workers' Compensation Commission Appeal No. 93702, decided September 27, 1993. In the instant case, the claimant had surgery prior to the date of statutory MMI so we are not faced with an issue of an amended designated doctor's report based on poststatutory MMI surgery.

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. We conclude that the hearing officer's determination that the claimant reached MMI on March 20, 2003, the statutory date of MMI, is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

With regard to the IR issue, the hearing officer found that the great weight of the other medical evidence is not contrary to the report of Dr. B, the designated doctor, that the claimant's IR is 12%, and concluded that the claimant's IR is 12% as reported by Dr. B, the designated doctor, in his May 8, 2003, report. The claimant contends that the hearing officer erred in adopting the 12% IR assigned by Dr. B, the designated doctor, in May 2003, pointing out that Dr. B did not reexamine the claimant after the claimant had surgery in January 2003. The claimant contends that the hearing officer should have adopted Dr. R's 24% IR. The carrier also asserts that the hearing officer erred in adopting Dr. B's 12% IR, contending that the 10% IR assigned by Dr. B is the correct IR.

Effective for a claim for workers' compensation benefits based on a compensable injury that occurs before June 17, 2001, Section 408.125(e) provides that if the

designated doctor is chosen by the Commission, the report of the designated doctor shall have presumptive weight, and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary, and that if the great weight of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other doctors. Section 401.011(23) provides that "impairment" means any anatomic or functional abnormality or loss existing after MMI that results from a compensable injury and is reasonably presumed to be permanent, and Section 401.011(24) provides that "IR" means the percentage of permanent impairment of the whole body resulting from a compensable injury.

The Appeals Panel has previously held that an IR is not assessed until MMI is reached. Texas Workers' Compensation Commission Appeal No. 92517, decided November 12, 1992; Texas Workers' Compensation Commission Appeal No. 93720, decided September 29, 1993. In the present case, both of the examinations performed by Dr. B, the designated doctor, were well prior to statutory MMI. Dr. B's final 12% IR was not based on a physical examination of the claimant performed after the claimant reached MMI. It appears that Dr. B merely took the information and data from his prior examinations, which were done well before statutory MMI, and added 2% for the surgery. In Texas Workers' Compensation Commission Appeal No. 960771, decided June 7, 1996, the Appeals Panel affirmed a hearing officer's determination that an IR assigned by a doctor on a date prior to the date the claimant reached MMI was invalid. In Texas Workers' Compensation Commission Appeal No. 972212, decided December 12, 1997, the Appeals Panel affirmed a hearing officer's determination that the claimant needed to be reexamined by the designated doctor where the designated doctor's examinations of the claimant "were all done prior to the date the claimant reached MMI."

In this case, Dr. B, the designated doctor, did not examine the claimant after the claimant had cervical surgery in January 2003 or after the claimant reached MMI on March 20, 2003. Thus, when Dr. B assessed the 12% IR in May 2003 in response to a Commission inquiry, Dr. B would not have known whether the claimant had residual symptoms following his surgery, or whether he had loss of ROM or neurological deficits after reaching MMI on March 20, 2003. Consequently, we reverse the hearing officer's decision that the claimant's IR is 12% as reported by Dr. B, the designated doctor, in his May 8, 2003, report, and we remand the case to the hearing officer to have Dr. B, the designated doctor, reexamine the claimant and assign an IR using the AMA Guides 3rd ed.

We affirm the hearing officer's determination that the claimant reached MMI on March 20, 2003. We reverse the hearing officer's determination that the claimant's IR is 12% as reported by Dr. B, the designated doctor, in his May 8, 2003, report, and we remand the case to the hearing officer for the hearing officer to have the claimant reexamined by Dr. B; for Dr. B to assign an IR under the AMA Guides 3rd ed.; and for the hearing officer to make further findings of fact, conclusions of law, and a decision on the IR issue.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission pursuant to Section 410.202, as amended effective June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of time in which a request for appeal or a response must be filed.

The true corporate name of the insurance carrier is **CONNECTICUT INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge